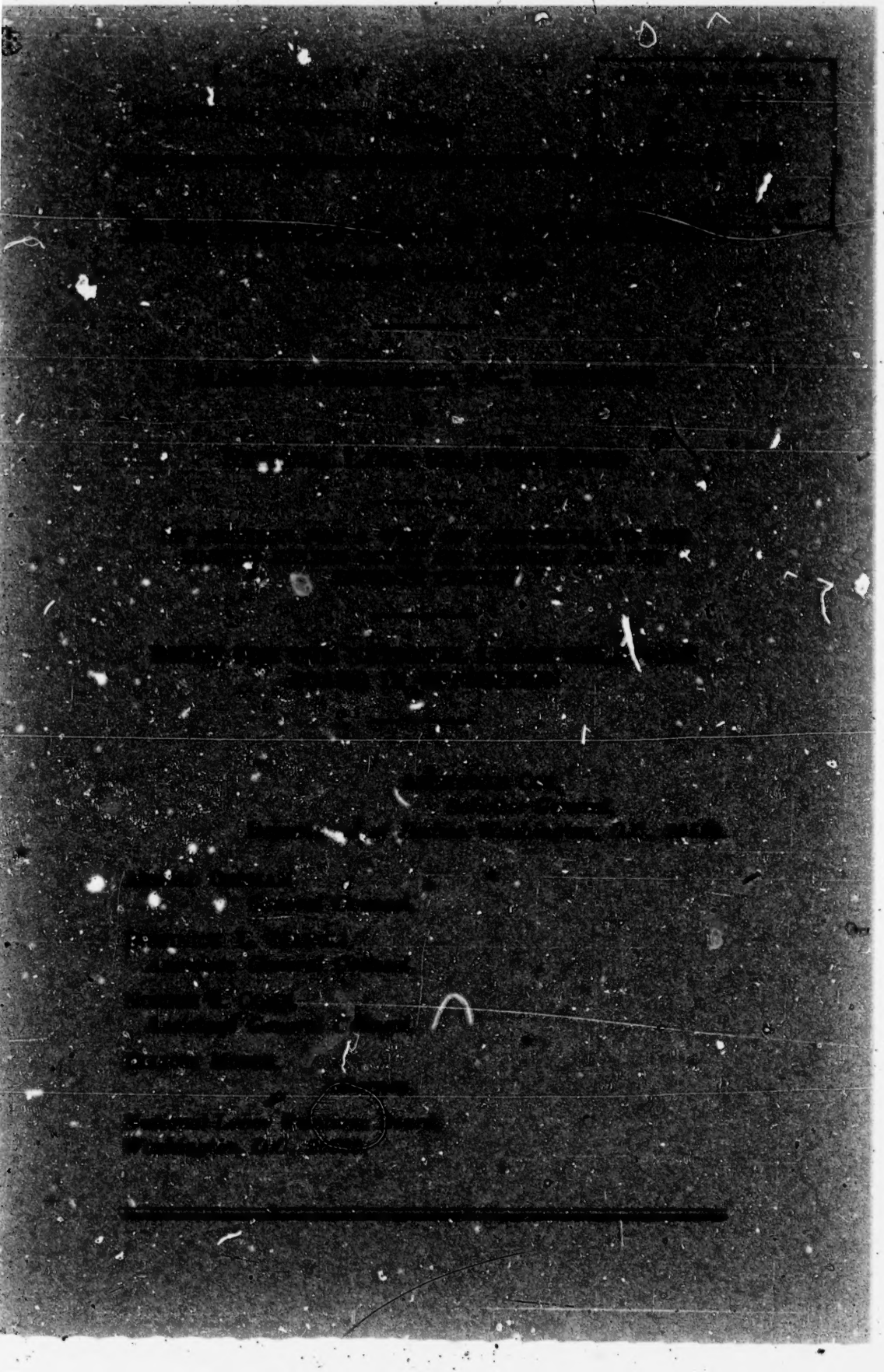

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
A. The Board's findings of fact	2
B. The decisions below	7
Argument	8
Conclusion	13

CITATIONS

Cases:

General Engineering, Inc. v. *National Labor Relations Board*, 341 F. 2d 570	13
Hendrix Manufacturing Co. v. *National Labor Relations Board*, 321 F. 2d 100	9
National Labor Relations Board v. *Clark Bros.*, 163 F. 2d 373	12
National Labor Relations Board v. *Colvert Dairy Products Co.*, 317 F. 2d 44	10
National Labor Relations Board v. *Entwistle Mfg. Co.*, 120 F. 2d 532	11
National Labor Relations Board v. *Mexia Textile Mills*, 339 U.S. 563	12
National Labor Relations Board v. *Parma Water Lifter Co.*, 211 F. 2d 258	9
National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U.S. 261	12
National Labor Relations Board v. *Rockwell Mfg. Co.*, 271 F. 2d 109	9
National Labor Relations Board v. *Threads, Inc.*, 308 F. 2d 1	10
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	9

Statute: Page

National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*)

Section 8(a)(1) 2, 7, 8, 11
Section 8(a)(3) 2, 8, 11
Section 8(c) 9

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 986

MARSH SUPERMARKETS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15-19) is reported at 327 F. 2d 109. The Board's Decision and Order are reported at 140 NLRB 899.

JURISDICTION

The decision and judgment of the court of appeals were entered on December 20, 1963 (Pet. 15), and

a decree was entered on January 10, 1964 (Pet. 20-24). A petition for rehearing was denied on March 4, 1964 (Pet. 2). The petition for certiorari was filed on April 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the findings of the Board that petitioner violated Section 8(a)(1) of the National Labor Relations Act by interfering with, restraining, and coercing its employees in the exercise of their statutory rights, and violated Section 8(a)(3), by discriminatorily discharging employee John Farinella.

2. Whether the Board's order is unduly broad, or was rendered moot by intervening circumstances.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at pp. 25-28 of the petition.

STATEMENT

A. The Board's Findings of Fact

1. *The preelection campaign against the Union.*— The Company is engaged in the sale and distribution of groceries and related products at retail. Its principal office, warehouse, and plant is located at Yorktown, Indiana, and it has six retail stores in Muncie,

Indiana (P.A. 15-16). Early in 1961, the Board scheduled a representation election among the employees at the Company's Yorktown warehouse, and a decertification election among the employees in its retail stores in the Muncie area (P.A. 16). A few days before the elections, due to be held on April 21, the Company began an active antiunion campaign.

On April 15, it called an evening meeting of its Yorktown employees at the Company cafeteria to award service pins to its senior employees (P.A. 17; 209-212). The Company's president, Estel Marsh, addressed the employees and urged them to vote against the Union.[2] During his address, Marsh quoted a number of passages from a book by Sylvester Petro, entitled *Power Unlimited—The Corruption of Union Leadership*, which asserted that unions were a bigger threat to the free enterprise system than was Russia. (P.A. 17-18; 58-61, 74-75, 80-81, 194-195.) Marsh also discussed the violence at the Kohler and Perfect Circle strikes, charging that the union had caused the violence (P.A. 18; 81). He pointed out that, without benefit of a union, the warehouse employees had a number of generous fringe benefits. Marsh warned that, if the Union won the election, these fringe benefits would be withdrawn, that the employees "would

---

"P.A." and "R.A." refer to portions of the record printed as appendices to the briefs filed by the Board and the Company respectively in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Retail Clerks International Association, Local Union No. 1441, AFL-CIO (P.A. 16).

have to start from the bottom and work up, that everything we now had would be wiped clean," that the employees would have to start "from scratch," and that "the board would just be wiped clean" (P.A. 44-47; 69-70, 80). In connection with taking away the employees' fringe benefits, Marsh specifically referred to the three-week vacation which most of the employees enjoyed (P.A. 44-47; 70, 75, 80-81).

During the week preceding the election, Marsh and Personnel Manager William Ast also addressed meetings of the employees at each of the Company's Muncie stores, at closing time. Marsh, and occasionally Ast, repeated the substance of the speech which Marsh had given at Yorktown (P.A. 46-47; 212-213). While speaking at store No. 9, Marsh told the employees that "if the Union gets in, you will have to start from scratch" (P.A. 46-47; 91-92). In the course of a speech at the same store, Ast implied that if the Union lost the election, the Company would continue certain of it's benefits unchanged (P.A. 243).

About a week before the election, Kenneth Raisor, District Supervisor of retail operations, asked employee Taylor of store No. 18 if he was "going to make the right vote." Taylor replied that he "thought it was the right vote," and "hoped it would be." (P.A. 20-21; 95.) The day before the election, Store Manager Merritt Marsh told Katherine Swoveland, a cashier at store No. 9, that, if the employees voted the Union out, she would not have to work nights as much as she had been. Swoveland had repeatedly objected to doing night work (P.A. 20; 88-96).

On April 21, the respective elections were held as scheduled. The Union lost both elections (P.A. 14).

About a week after the election, employee Wulff, who had served as shop steward for the Union (P.A. 100-102), asked Store Manager Franklin how she would be affected by the forthcoming shutdown of another store and the transfer of employees to her store. Franklin replied that it would not affect her because he understood that she had planned to resign if the Union lost the election. Franklin added, "It would make it easier on everyone if you would just quit." Wulff replied that she had no intention of resigning. Franklin accused her of talking unfairly about the Company and about himself before the election, and finally told her "to get the hell out". (P.A. 9-10, 48; 105-108).

2. *The discharge of employee Farinella.*—John Farinella began working for the Company as a produce manager in 1951. He joined the Union in 1957, served on the committee which negotiated the 1958 and 1959 contracts, and from 1959 until after his discharge served as president of the Union (P.A. 22; 120-125). About two weeks before the election of April 21, Dave Somers, the head of the Company's retail operations, told Farinella, "John, I don't know what has come over you. Here you were a good company man and now you are president of Local 1441. We can't understand" (P.A. 29; 125-126). On May 26, a few weeks after the expiration of the collective bargaining agreement, Farinella's department was inspected by produce specialist Faye Hous-

ton. Houston made a number of criticisms, calling for corrections which Farinella was able to make in 10 or 15 minutes. Without warning Farinella, Houston telephoned Personnel Manager Ast and requested permission to discharge Farinella. Ast replied that he would have to discuss the matter with Somers, who was out of town (P.A. 28, 31; 184-185, 287-288).

When Farinella reported for work on Friday, June 2, following a day off, he found that much of the work which was supposed to have been completed the day before had not been finished. Shortly after he began to work, the supply truck arrived and under a recently instituted practice Farinella had to unload the truck and let his other work fall behind (P.A. 23-24; 131-132, 139-140, 143-145, 157, 222-223). At about 11 a.m., Farinella told the store manager that the produce department was behind schedule and needed assistance (P.A. 23-24; 147-148, 177). Farinella worked until a short time after his regular quitting time of 3 p.m., leaving the remaining work to two part-time employees, since he had been instructed to see that no employee worked overtime that week (P.A. 23; 141, 152-153).

Shortly after Farinella's departure, District Supervisor Raisor and Produce Specialist Houston arrived at the store (P.A. 25; 279). The two men inspected the produce department, and requested the assistant manager to summon Farinella (P.A. 25; 280-291). Raisor then telephoned Kintner, the Company's vice president and requested permission to discharge Fari-

nella. Kintner told Raisor that, if Farinella had not asked for help during the day, Raisor had permission to fire him (P.A. 25; 281-283). When Farinella returned to the store, Raisor told him he was fired because of the condition of his department. Farinella replied that he had not had enough help during the day,[3] but Raisor asserted that he had not told anyone and at any rate that was "beside the point now" (P.A. 25-26; 284). Farinella then said, "I figured I had lost my job . . . when the Retail Clerks had lost their election." Raisor replied, "That's not true," and added, "Well, I have got a boss, and you have got a boss" (P.A. 158).[4]

B. The Decisions Below

On these facts, the Board found that the Company had violated Section 8(a)(1) of the Act by coercively interrogating Taylor, by promising a benefit to Swoveland if she voted against the Union, by threatening to withdraw certain employee benefits if the Union won the election, and by threatening to discharge Wulff because of her Union activity. The Board further found that the discharge of John Farinella was a dis-

---

[3] The Board credited Farinella's testimony that he had requested assistance (P.A. 24).

[4] Meritt Marsh, the store manager, took no part in the discussion which led to Farinella's discharge, even though store managers were almost always consulted when a department head was to be discharged (P.A. 32-35; 230-233, 261, 263-265).

criminatory discharge in violation of Section 8(a)(3) and (1) (P.A. 5-11).[4]

The Board's order required the Company to cease and desist from these unfair labor practices and from otherwise interfering with, restraining, or coercing its employees in the exercise of their rights under the Act. Affirmatively, the order required the Company to offer employee Farinella reinstatement, to make him whole for any loss of pay suffered by reason of the discrimination against him; and to post appropriate notices. (P.A. 11-12, 39-40.)[5]

The court of appeals sustained the Board's findings (except as to employee Wulff, n. 5, *supra*) and enforced its order (Pet. 15-19).

ARGUMENT

1. Petitioner's attack on the substance of the Board's unfair labor practice findings (Pet. 9-14) raises only evidentiary issues which do not warrant

---

[4] The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by reducing the hours of work of employee Wulff because of her Union activity (P.A. 9-11). The court of appeals found that the record did not show that her hours were in fact reduced, and accordingly declined to enforce that portion of the Board's order (Pet. 19).

[5] On the basis of the Company's unlawful preelection conduct, the Board also set aside both elections and directed the Regional Director to "conduct new elections at such time as he deems appropriate" (P.A. 11). On May 23, 1963, the Regional Director held a second election at the Yorktown Food Center, but not at the Muncie stores. On August 2, 1963, the Board certified that the Union had lost that election. (Pet. 29-30.)

review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the facts summarized in the Statement furnish ample support for the Board's findings.

Thus, President Marsh reminded the employees that without a union they had received liberal fringe benefits—specifically mentioning their three-week vacation—but warned that, if the Union came in, the board would be "wiped clean" and the employees would have to "start from scratch" (pp. 3-4, *supra*). As the court below held (Pet. 17), the "Board could reasonably have inferred that the 'listener-employees' took the statements as threats of loss of benefits and of economic reprisal," and hence find that the statements went beyond the "expressing of any views, argument, or opinion" protected by Section 8(c) of the Act. See *Hendrix Manufacturing Co.* v. *National Labor Relations Board*, 321 F. 2d 100, 104-105 (C.A. 5); *National Labor Relations Board* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 260 (C.A. 9). Similarly, the Board was warranted in concluding that more than an expression of "views, argument, or opinion" was involved in Supervisor Raisor's interrogation of Taylor as to whether he was "going to make the right vote"; Manager Merritt Marsh's promise to Swoveland that, if the employees rejected the Union, she would not have to do so much night work; and Manager Franklin's efforts to force Wulff to quit because of her Union activity (pp. 4-5, *supra*).

Contrary to petitioner (Pet. 9), there is no conflict with *National Labor Relations Board* v. *Rockwell Mfg. Co.*, 271

It is likewise apparent that the Board was warranted in finding that Farinella was discharged because of his Union activity. The record shows (pp. 5-7, *supra*) that Farinella, the Union's president, was discharged shortly after the Union lost the election and its collective bargaining agreement expired. He was discharged ostensibly for the poor condition of his department, but his explanation for any deficiencies was swept aside, and, contrary to the Company's practice, the store manager was not consulted. Moreover, as the court below noted (Pet. 19): "The officials first acted as though his firing depended on whether he asked for help. . . . The examiner credited Farinella's contradicted testimony that he had. In any event, whether he had or not was later said to be 'beside the point.'" Finally, the chart respecting Farinella's job performance, introduced by the Company at the Board hearing, was equivocal[1] and there was no showing that the Company even consulted it in discharging Farinella (Pet. 19).

F. 2d 109 (C.A. 3); *National Labor Relations Board* v. *Threads, Inc.*, 308 F. 2d 1 (C.A. 4); *National Labor Relations Board* v. *Colvert Dairy Products Co.*, 317 F. 2d 41 (C.A. 10). There, unlike here, it was found that the statements relied on by the Board could not reasonably be viewed as containing a threat of reprisal or a promise of benefit, and thus they were clearly within the ambit of Section 8(c).

[1] The chart, Respondent's Exhibit 11 (R.A. 168-169), compares the "dollars per man hour" of Farinella's department with the *average* for other produce departments without showing his performance relative to other produce departments which were also below average.

2. There is no merit to petitioner's contention (Pet. 7-9) that the Board's order is unduly broad. The order requires petitioner to refrain from unlawfully discouraging membership in the Union "or in any other labor organization," by discriminating against its employees in regard to their employment, or "in any other manner" restraining them in the exercise of their organizational rights. In the circumstances of this case, such an order was well within the Board's broad remedial power. An employer who has engaged in violations of Sections 8(a)(1) and (3) of the Act with respect to one union may be expected to oppose successor organizations with equal vigor. By the same token, employees whose rights have been invaded on one occasion in retaliation for their organizational activities should be assured of protection in the future, even though they choose a new labor organization. Furthermore, in view of petitioner's varied program of illegal action—action which violated two distinct provisions of the statute and went to "the very heart of the Act" (*National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4))—the Board could properly find that petitioner would be likely to resort to additional types of unfair labor practices should there be other organizational activities in the future.

3. Equally groundless is petitioner's contention (Pet. 6-7) that the Board's order is moot insofar as it relates to the unfair labor practices committed at the Yorktown warehouse. It is true that, subsequent to the commission of those unfair practices, the Union

lost a second election at Yorktown and the Board certified the results. These circumstances, however, by no means eliminated the need for an injunctive remedy. It is well settled that the Board is entitled to a remedial order even where the unfair labor practices have been discontinued, so as to protect against a repetition of the same illegal conduct in the future. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 271; *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567-568. So here, the fact that the Union lost the second election at Yorktown does not mean that organizational activity at that location is forever barred; a remedy for the unfair labor practices which preceded the first election is still needed in order to safeguard the employees against a repetition of the same conduct should there be further attempts to organize them in the future. *See National Labor Relations Board* v. *Clark Bros.*, 163 F. 2d 373, 375 (C.A. 2). To the extent that *General Engineering, Inc.* v. *National Labor Relations Board*, 311 F. 2d 570, 573 (C.A. 9), reaches a different conclusion, it is contrary to the settled principles enunciated by this Court. In any event, the situation here is distinguishable. For, even if the second election at Yorktown were to moot the unfair labor practices committed there, it would have no bearing on the unfair practices committed at the Muncie stores (n. 6, p. 8, *supra*), and the Board's order could still be sustained on the basis of the latter violations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ELLIOTT MOORE,
Attorney,
National Labor Relations Board.

May 1964.

U. S. GOVERNMENT PRINTING OFFICE 1964